(1) 95-1392

Supreme Court, U.S.
FILED
FEB 26 1996
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ENRIQUE RUIZ-MENDOZA A/K/A HENRY,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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35 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's denial of Petitioner's Motion for New Trial when the trial court applied the more burdensome legal standard to deny Petitioner's Motion for New Trial?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent, United States of America, was represented before the trial court, and before the Fifth Circuit court of Appeals by the United States Attorneys Office for the Southern District of Texas. The specific assistant United States attorneys who participated before the U.S. District Court were Francis McIlvaine and Richard K. Harris. The specific assistant United States Attorneys who participated before the Fifth Circuit Court of Appeals were Paula C. Offenhauser and Richard K. Harris.

The Petitioner was represented at the trial court level by defense attorney Eduardo Jaime of Laredo, Texas. The petitioner was represented before the Fifth Circuit Court of Appeals by the defense attorney Emilio Davila, Jr., of Laredo, Texas, who is also representing the Petitioner before this Honorable Court.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ENRIQUE RUIZ-MENDOZA A/K/A HENRY,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Enrique Ruiz-Mendoza a/k/a Henry petitions[1], for issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. infra, 1a) is not reported. The Opinion of the Court of Appeals denying Petitioner's Motion for Re-hearing (App. infra, 9a & 10a) is not reported.

[1] The parties in the Court below were Enrique Ruiz-Mendoza a/k/a Henry as Appellant-Defendant, and the United States as Appellee-Plaintiff.

The order of the District Court denying Petitioner's Motion for New Trial (App. infra, 15a) is not reported.

JURISDICTION

The decision of the Court of Appeals which affirmed Petitioner's conviction was entered on October 26, 1995. Petitioner's Petition for Rehearing was denied November 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides in relevant part:

Rule 33. New Trial

"The Court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period".

STATEMENT

This petition arises to determine whether the Government deprived Petitioner of a fair trial by one, using the perjured testimony of Guadalupe Garza Rodriguez who was the key Government witness, and by, two, failing to disclose the Government's true plea agreement with Guadalupe Garza Rodriguez. The trial court summarily denied Petitioner's Motion for New Trial raising these two issues, and the Court of Appeals affirmed.

A. Course of Proceedings in the U.S. District Court below.

Petitioner was indicted on a superseding criminal indictment, and only Count 3 and Count 14 were submitted to the jury. Count 3 charged Petitioner with conspiring to possess with the intent to distribute at least 1000 kilograms of marihuana, and Count 14 charged Petitioner with knowingly possessing at least 50 kilograms of marihuana. (R. Docket Ent. 220). The jury found Petitioner guilty on both counts. (R. Docket Ent. 336).

Petitioner was sentenced to 188 months imprisonment as to Count 3, and to 60 months imprisonment on Count 14 to run concurrent. (R. Docket Ent. 462).

On May 4, 1994 Petitioner timely filed a Motion for New trial with supporting affidavit based on newly discovered evidence. (App. infra, 11a).

The trial court on August 9, 1994 without an evidentiary hearing denied Petitioner's Motion for New Trial, and his Motion to depose Guadalupe Garza Rodriguez. (App. infra, 15a).

There is an uncontroverted affidavit in the record by Guadalupe Garza Rodriguez dated February 4, 1994 wherein he states that he untruthfully testified at Petitioner's trial because he was pressured by Laredo DEA agents. (App. infra, 11a). The Government had a Writ of Habeas Corpus ad testificundum issued for Guadalupe Garza Rodriguez to testify at trial against Petitioner.

At trial on July 6, 1993 Guadalupe Garza Rodriguez told the jury that he delivered numerous loads of marihuana to Petitioner (1 ROA 285). He further testified that his only plea agreement with the Government was for the Government to try and get him moved to a "camp type" corrections facility. (1 ROA 300). During cross examination Guadalupe Garza Rodriguez specifically denied that the agents pressured him with prosecution for the other loads. (1 ROA 300).

On February 4, 1994 Guadalupe Garza Rodriguez signed an affidavit recanting his trial testimony against Petitioner. (App. Infra, 14a). That affidavit was made available to undersigned appellate counsel for Petitioner on or about March 3, 1994. On March 19, 1994 undersigned appellate counsel for Petitioner traveled to the Federal Corrections Institute at Bastrop to interview Guadalupe Garza Rodriguez in reference to

his affidavit. At the interview Guadalupe Garza Rodriguez affirmed that he had not delivered any loads of marihuana to Petitioner, and that he had never seen Petitioner receive any loads of marihuana. When asked why he had testified to the contrary at Petitioner's trial he stated that two Laredo Federal agents had visited him in prison prior to Petitioner's trial. That the agents told him that if he did not testify against Petitioner he (Guadalupe Garza Rodriguez) would be charged with the conspiracy, and would serve an additional 10 to 15 years. (App. infra, 11a).

On May 4, 1994 undersigned appellate counsel filed Petitioner's Motion for New Trial based on newly discovered evidence, and attached a copy of the affidavit signed by Guadalupe Garza Rodriguez in support thereof. Additionally, Petitioner filed a Motion to depose Guadalupe Garza Rodriguez so that he could elaborate on his affidavit of February 4, 1994. The trial court in an Order, without an evidentiary hearing or controverting affidavits, denied both of Petitioner's Motions. (App. infra, 15a).

Before trial, Petitioner, timely filed a discovery motion requesting, inter alia, the substance of all promises or plea agreements between the witnesses and the Government. (R Docket Ent. 115). The trial Court entered an order directing the Government to disclose at least all matters required by Rule 16, Fed. Crim. P. (R Docket Ent. 164), and subsequently, entered another order directing the Government "to disclose to each defendant the names of any cooperating witness

for whom the Government has agreed to pay money, reduce charges, or confer any other benefit." (R. Docket Ent. 224).

Prior to trial the Government did not reveal it had a plea agreement with Guadalupe Garza Rodriguez. When called to testify by the Government, upon direct examination, Guadalupe Garza Rodriguez states that he is only testifying so he can go to a camp a few months earlier (1 ROA 300). He specifically denied that the agents pressured him with prosecution for the other loads (1 ROA 300). After having untruthfully minimized the benefit he was to receive from the Government, Guadalupe Garza Rodriguez, upon direct examination proceeded to give direct devastating testimony against Petitioner Ruiz.

Guadalupe Ruiz Rodriguez identified Petitioner in the courtroom as the person to whom he had delivered numerous loads of marihuana (1 ROA 285). That he delivered four or five loads of marihuana to Petitioner. (1 ROA 286). He testified that Petitioner received the loads, and would help unload the marihuana. (1 ROA 287).

In closing arguments the Government emphasized to the jury that all the Government could possibly do was recommend that Guadalupe Garza Rodriguez go to a camp a little sooner; that he would eventually be moved to a camp with or without the Government's recommendation. (3 ROA 768-69). In closing arguments the Government also emphasized his testimony to the jury. The Government told the jury:

"Guadalupe Rodriguez who's the driver said that on four occasions he dropped off loads of marihuana with RUIZ." (3 ROA 776).

Even the trial court in its instructions to the jury told them that they are entitled to know and consider the motivations and inducements offered to Government witnesses. (3 ROA 862). The trial court emphasized to the jury that the only motivation for Guadalupe Garza Rodriguez was that he was hoping that he might eventually get transferred to a prison camp. (3 ROA 861).

The jury retires to deliberate, and finds Petitioner guilty of count 3 which was a general conspiracy count involving over 1000 kilograms, and Count 14 a substantive count for possession of 80 kilograms of marihuana. (R. Docket Ent. 336).

It is under these circumstances, that seven months later, Guadalupe Garza Rodriguez signs an affidavit recanting his trial testimony as to Petitioner. The affidavit was attached as an exhibit to the Motion for New Trial filed with the trial court. (R. Docket Ent. 476) and (App. infra, 14a). Therein Guadalupe Garza Rodriguez states that he lied about Petitioner's involvement because DEA agents pressured him into doing so. The affidavit of Guadalupe Garza Rodriguez and his statements to counsel are in the Motion for New Trial, and were <u>never</u> controverted by the Government.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS INCONSISTENT WITH THIS COURT'S DECISIONS IN *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, (1972) AND *Demarco v. United States*, 415 U.S. 450 (1974).

In *Giglio*, this Court held that "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with rudimentary demands of justice. Therein the trial court did hold an evidentiary hearing to determine whether the Government's witness had lied when he testified at trial that he had no plea agreement with the Government. The trial Court determined that "even if a promise had been made it was not authorized and the disclosure to the jury would not have affected its verdict." Id., 405 U.S. 150, 153. This Court reversed and remanded stating that a new trial is required if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury." In the case at bar, the trial court did not even afford Petitioner RUIZ an evidentiary hearing, and summarily denied Petitioner's Motion for New Trial.

Subsequently, in *Demarco v. United States*, 415 U.S. 450, 94 S.Ct. 1185 (1974) the witness had lied when at trial that he had no plea agreement with the Government. This court held that "failure to disclose that Government's witness has engaged in plea bargaining vitiates the conviction". Id, 415 U.S. 450. In *Demarco v. Untied States*, Id., there was no evidentiary hearing before the trial court. Nonetheless, the Court of Appeals resolved the issue based on the materials

before it, and concluded that no promises had been made to the witness prior to the witness' testimony at petitioner's trial. Therein this Court reversed and remanded holding that the

> "issue should have been remanded for initial disposition by the district court after an evidentiary hearing, and should not have been resolved by the Court of Appeals based on the materials before it". Id., 415 U.S. 450.

Subsequently, in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985) this Court considered the perjured testimony of two Government witnesses who testified they had no plea agreement with the Government. This Court held that if the undisclosed information is material the conviction must be reversed if its suppression undermines confidence in the outcome of the trial. This court reversed the trial court even though there had been an evidentiary hearing, and the trial court had found even if the plea agreement had been disclosed the disclosure would have had no effect upon the outcome. This Court stated that:

> "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Id., at 675.

Therein this Court also noted:

> "when the prosecutor received a specific and relevant request, the failure to make any response is seldom, if ever, excusable." Id., at 682.

In the case at bar, the affidavit of Guadalupe Garza Rodriguez is uncontroverted. The Government in it's written response did not even bother to submit controverting affidavits by the DEA agents who visited Guadalupe Garza Rodriguez in prison prior to Petitioner's trial.

II. REVIEW BY THE SUPREME COURT IS NECESSARY TO PROMOTE UNIFORMITY OF DECISIONS IN THE FIFTH CIRCUIT COURT OF APPEALS ITSELF.

The Fifth Circuit Court of Appeals in its opinion in the instant case (App. infra, 1a) acknowledges at (App. infra, 4a) that a different standard applies to motions for new trial when "the government's case included false testimony and the prosecution knew or should have known of the falsehood". The appellate court's opinion (App. infra, 4a) goes on to state that in that event "a new trial must be held if there was any reasonable likelihood that the false testimony would have affected the judgment of the jury". Nonetheless, the appellate court in its opinion fails to apply to petitioner Ruiz this more lenient standard. The appellate court in affirming the denial of Petitioner's Motion for New trial simply concludes that "Ruiz Mendoza did not prove false testimony or knowledge of such by the government". (App. infra, 5a).

Guadalupe Garza Rodriguez, who was the Government's main witness, identified Petitioner in the Courtroom as the person to whom he had delivered numerous loads of marihuana. (1 ROA 285-86). Seven months later the same Guadalupe Garza Rodriguez signed a witnessed statement stating "I knew he (Enrique Ruiz Mendoza) was not involved in what I testified. I was pressured by the DEA agents from Laredo, Texas". (App. infra, 14a).

Obviously the trial testimony and in court identification by Guadalupe Garza Rodriguez was false, and we know that because Guadalupe Garza Rodriguez himself tells us so. (App. infra, 11a).

The second prong of the more lenient test requires that the Petitioner make a showing that the Government knew about the false testimony. There is no doubt but that the Government knew, or should have known, because Guadalupe Garza Rodriguez tells us the Federal Agents pressured him to testify though he knew Petitioner was not involved. (App. infra, 14a).

The opinion of the Fifth Circuit Court of Appeals in this case (App. Infra, 1a) contradicts prior discussions of the Fifth Circuit itself. In *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979) a trial witness falsely testified that his attorneys fees had not been paid by law enforcement authorities. Subsequent to trial the Defendant learned that the State authorities had in fact paid for the witness's attorneys fees, and that the State authorities had advised the witness not to reveal that fact. Therein the appellate Court considered whether the falsehood should be attributed to the Federal

Prosecutors. That court held that "had the investigators been federal, their knowledge would have been imputed to the prosecution". Id., at 569.

Petitioner was erroneously denied a new trial because false testimony was used at his trial, and the Government knew or should have known about it. In Petitioner's case it was Federal agents, that is, agents of the Federal Government, who pressured Guadalupe Garza Rodriguez for the false testimony against Petitioner Ruiz-Mendoza.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 1996

Counsel for Petitioner

APPENDICES

APPENDIX A

[Filed Oct. 26, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7718
Summary Calendar

UNITED STATES OF AMERICA ,

Plaintiff-Appellee

versus

ENRIQUE RUIZ-MENDOZA a/k/a Henry, and HECTOR FIDEL ENRIQUEZ,

Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR 92-209-9)

Before DAVIS, BARKSDALE, and DeMOSS, Circuit Judges.
PER CURIAM:[1]

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[1]Local Rule 47.5 provides: "The publication of opinion that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that

Enrique Ruiz-Mendoza appeals the district court's denial of his motion for new trial, and Hector Fidel Enriquez appeals his conviction of conspiracy to possess marijuana with intent to distribute. We Affirm.

I.

A jury found Ruiz-Mendoza and Enriquez guilty of conspiracy to possess 1000 kilograms of marijuana with intent to distribute, in violation of 21 U.S.C. Section 841(a)(1) and 846. Ruiz-Mendoza was also convicted of possession with intent to distribute at least 50 kilograms of marijuana.

After Ruiz-Mendoza appealed, he moved for a new trial while his appeal was pending. The motion was based on newly discovered evidence, a statement[2] in which a government witness, Guadalupe Garza-Rodriguez, recanted the testimony that he gave at Ruiz-Mendoza's trial. Ruiz-Mendoza moved also to depose Garza-Rodriguez, and for a conditional remand to allow the district court to consider his new trial motion; the motion was granted by this court. However, before this court conditionally remanded the case to the district court, it denied the motion for a new trial and the motion to depose Garza-Rodriguez.

Rule, the court has determined that this opinion should not be published.

[2]Garza-Rodriguez's statement does not qualify as an affidavit under 28 U.S.C. Section 1746. Although Garza-Rodriguez signed the statement in the presence of two witnesses, he did not include the declaration required by 28 U.S.C. Sec. 1746.

II.

Ruiz-Mendoza challenges the denial of his new trial motion, claiming that the government pressured Guadalupe Garza Rodriguez to give untruthful testimony against Ruiz-Mendoza at trial and failed to disclose an alleged plea agreement with Rodriguez at trial. Ruiz-Mendoza claims that the district court erroneously denied an evidentiary hearing and applied an improper standard for granting a new trial.[3] Motions for a new trial based on newly discovered evidence are generally disfavored and are viewed with caution. *United States v. Pena* 949 F.2d 751, 758 (5th Cir. 1991). This court will reverse a denial of a new trial only when there is an abuse of discretion. *United States v. Sanchez-Sotelo*, 8 F.3d 202, 212 (5th Cir. 1993), cert. Denied, ___ U.S. ___, 114 S. Ct. 1410 (1994).

To prevail on a new trial motion based on newly discovered evidence, a defendant must show that (1) the evidence is in fact newly discovered and was unknown to the defendant at the time of trial; (2) the failure to discover the evidence was not due to the

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[3]The district court was within its power in denying the motion, even though it would not have had jurisdiction to grant the motion when it ruled. See ***United States v. Burns***, 668 F.2d 855, 857-58 (5th Cir. 1982). Although Ruiz-Mendoza did not file a notice of appeal of the order denying a new trial or the order denying his motion for reconsideration, a second notice of appeal was not necessary to obtain review of the order denying his motion for a new trial. See ***id***. At 857-58. Whether the motion for new trial should have been denied is properly before this court.

defendant's lack of diligence; (3) the evidence is more than merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence introduced at a new trial would probably produce an acquittal. *United States v. Jaramillo*, 42 F.3d 920, 924-25 (5th Cir. 1995), cert. Denied, ___ U.S. ___, 115 S. Ct. 2014 (1995); *United States v. Time*, 21 F.3d 635, 642-43 (5th Cir. 1994).

There is an exception to the above-stated test; however, if the government's case "included false testimony and the prosecution knew or should have known of the falsehood". *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979). "[I]n that event a new trial must be held if there was any reasonable likelihood that the false testimony would have affected the judgment of the jury." *Id.* Accordingly, to obtain a new trial on his claim, Ruiz-Mendoza had to prove that Rodriguez's statements were false, that the statements were material (a highly significant factor reasonably likely to affect the judgment of the jury), and that the prosecution knew they were false. *Griffith v. United States*, 535 F.2d 320, 321 (5th Cir. 1976) (citations omitted).

Ruiz-Mendoza claims in his motion for a new trial that the government had an undisclosed plea agreement with Rodriguez and that "Rodriguez stated that two [f]ederal agents . . . told him that if he did not cooperate, and give incriminating testimony against Mr. Ruiz and others, that additional charges would be brought against Mr. Rodriguez, and that he would serve 10-15 more years." To the contrary, Rodriguez's statement says nothing about an alleged plea agreement. Rodriguez states that he was pressured by

the DEA agents and "knew [Ruiz] was not involved in what [he] testified," but Rodriguez gives no details to substantiate this assertion. In light of the conclusory nature of Rodriguez's statement (which did not declare it was under penalty or perjury) and the contrary testimony of several other witnesses, Ruiz had not proven that Rodriguez's ordinary testimony was false or that the government knew it was allegedly false. He also has not shown that the government entered into a plea bargain with Rodriguez, or that the government failed to disclose the alleged plea bargain.

Though Ruiz-Mendoza claims that the proper legal standard for granting a new trial is whether there is any reasonable likelihood that the judgment of the jury was affected by false testimony, it is improper to apply this standard because Ruiz-Mendoza did not prove false testimony or knowledge of such by the government.

Furthermore, it was not necessary for the district court to hold an evidentiary hearing. Having had the opportunity to observe the direct and cross-examination of Rodriguez, the court could find that his recantation of his trial testimony was incredible and deny Ruiz-Mendoza's motion for a new trial without an evidentiary hearing. *United States v. MMR Corp*, 954 F.2d 1040, 1046 (5th Cir. 1992).

The district court thus did not err in using the general standard of whether the allegedly new evidence would probably produce an acquittal. See *Jaramillo*, 42 F.3d at 924; *Time*, 21 F.3d at 642-43. Moreover, Ruiz-Mendoza failed to establish that the allegedly newly

discovered evidence would probably have produced an acquittal. In addition to Garza-Rodriguez's estimony, several other co-conspirators testified regarding Ruiz-Mendoza's involvement in the conspiracy. Pursuant to the district court's ruling that the claimed new evidence probably would not have resulted in an acquittal, the denial of the new trial motion was not an abuse of discretion. See *Time*, 21 F.3d at 642-43; see *Jaramillo* 2 F.3d at 924-25.

B.

Enriquez contends that the government did not present sufficient evidence to support his conviction for conspiracy to possess marijuana with intent to distribute. In reviewing challenges to the sufficiency of the evidence, we determine whether a rational trier of fact could find that the evidence establishes guilty beyond a reasonable doubt. *United States v. Ivey*, 949 F2d 759, 766 (5th Cir. 1991) cert. Denied, ___ U.S. ___, 113 S. Ct. 64 (1992). In so doing, we view "all evidence and any inferences that may be drawn from it in the light most favorable to the government." *Id.* The focus is not "whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit". *Herrera v. Collins*, ___ U. S. ___, 113 S. Ct. 853, 861 (1993). The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except that of guilt, an this court will accept all credibility choices that tend to support the verdict. *United States v. Pofahl*, 990 F.2d 1456, 1467 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 266 (1993) and ___ U. S. ___, 114 S. Ct. 560 (1993).

To prove the drug conspiracy charges, the Government was required to establish beyond a reasonable doubt (1) that a conspiracy existed, i.e., that two or more people agreed to violate the narcotics laws; (2) that the defendant knew of the conspiracy; and (3) that the defendant voluntarily participated in it. *United States v. Cardenas*, 9 F.3d 1139, 1157 (5th Cir. 1993), cert. Denied, ___ U. S. ___, 114 S. Ct. 2150 (1994). The elements of the conspiracy need not be proved by direct evidence; instead, they may be inferred from circumstantial evidence. *Id.*

Thus, agreement may be inferred from "concert of action", and voluntary participation inferred from a "collection of circumstances". *Id.* Similarly, knowledge of the conspiracy may be inferred from a "collection of circumstances", including evidence of erratic and evasive behavior. *Id.* "Although mere presence at the scene of the crime or a close association with a co-conspirator along cannot establish voluntary participation in a conspiracy, presence or association is a factor that, along with other evidence, may be relied upon to find conspiratorial activity by the defendant." *Id.* (internal citation omitted). Finally, as the Supreme Court recently made explicit, "to establish a violation of 21 U.S.C. Sec. 846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy". *United States v. Shabani*, ___ U. S. ___ , 115 S. Ct. 382, 385 (1994).

Enriquez failed to show that no reasonable jury could find him guilty of conspiracy beyond a reasonable doubt. The evidence presented at the trial

established that he received money from Ruben through Diaz as a down-payment on a load of marijuana; that he transported the money which was subsequently seized by police; that he stored marijuana at a stash house; and that he had a key to that stash house.

In sum, the evidence supports the jury's finding that Enriquez agreed with at least one other person to violate the narcotics laws; that Enriquez knew of the conspiracy, and that he voluntarily participated in the conspiracy. See *Cardenas*, 9 F.3d 1139 at 1157.

III.

For the foregoing reasons, the judgments are AFFIRMED.

APPENDIX B

[Filed Nov. 30, 1995]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 93-7718

UNITED STATES OF AMERICA,

Plaintiff-Appellants,

versus

ENRIQUE RUIZ-MENDOZA a/k/a Henry, and HECTOR FIDEL ENRIQUEZ,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITIONS FOR REHEARING
(November 30, 1995)

Before DAVIS, BARSDALE AND DEMOSS, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above case are DENIED.

Clerk's Note:
See FRAP and Local Rules 41 for Stay of the Mandate

ENTERED FOR THE COURT:
/s/
Rhesa H. Barksdale
UNITED STATES CIRCUIT JUDGE

APPENDIX C

[Filed May 4, 1994]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

THE UNITED STATES OF AMERICA	*	
VS.	*	L-92-209
RUBEN RODRIGUEZ, ET AL.	*	

MOTION FOR NEW TRIAL

ENRIQUE MENDOZA RUIZ, the defendant in the above-entitled action, by his undersigned attorney, moves the court pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial.

This motion is made on the grounds that, subsequent to the conclusion of the trial, defendant discovered new evidence, which evidence is not merely cumulative or impeaching, but is relevant and material to the issues involved in this case, and is of such a character that it would probably result in a different verdict at a new trial, and which evidence the defendant could not in the exercise of due diligence have discovered before trial.

This motion is based on all the files and records of this action, including the PSI which was filed as to this

defendant, and on the affidavit of Guadalupe Garza Rodriguez, attached hereto and marked Exhibit "A", and on evidence that may be produced at the hearing hereon.

Guadalupe Garza Rodriguez is the affiant in Exhibit "A", and he testified pursuant to a writ of prosecundum issued by the Government. He testified in the above numbered cause at the jury trial of Enrique Mendoza Ruiz on or about the 6th day of July, 1993. Exhibit "A" was made available to undersigned counsel on or about March 3, 1994, when undersigned counsel was retained to represent Enrique Mendoza Ruiz to appeal his conviction. Undersigned counsel obtained a transcript of the trial of Enrique Mendoza Ruiz for purposes of reviewing the trial testimony of Guadalupe Garza Rodriguez. Mr. Rodriguez testified at the trial that Mr. Ruiz would receive the loads of marihuana in San Antonio (Tr. pg. 284). Mr. Rodriguez further testified that he delivered some of the marihuana loads to Henry Ruiz (Tr. pg. 285). Mr. Rodriguez further testified that he delivered about 4 or 5 loads of marihuana to Mr. Ruiz (Tr. pg. 286).

On March 19, 1994 undersigned counsel traveled to the Federal Corrections Institute at Bastrop, Texas, for purposes of interviewing Guadalupe Garza Rodriguez in reference to Exhibit "A". Mr. Guadalupe Garza Rodriguez stated that he did NOT deliver any loads of marihuana to Henry Ruiz, and that he had never seen Henry Ruiz receive any loads of marihuana. Mr. Rodriguez was then asked why he had testified to the contrary. Mr. Rodriguez stated that two Federal agents had visited him in prison prior to the trial of Mr. Ruiz. That the agents told him that if he did not cooperate, and

give incriminating testimony against Mr. Ruiz, that additional charges would be made against Mr. Rodriguez, and that he would serve 10-15 more years.

When Guadalupe Garza Rodriguez testified at the trial he testified that his only plea agreement with the Government was to try to get moved to a "camp-type" corrections facility.

WHEREFORE, PREMISES CONSIDERED, Defendant, Enrique Ruiz Mendoza prays that this Motion for New Trial be set for a hearing, and that subsequent thereto this Motion be in all respects GRANTED. Defendant further prays for all other relief to which he may be entitled.

Respectfully submitted,

/s/

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1112 San Agustin
Laredo, Texas 78040
(210) 723-3639
(210) 727-8130

CERTIFICATE OF SERVICE

On the 3rd day of April, 1994, a true and correct copy of the foregoing Motion for New Trial was mailed to Mr. Frances McIlvaine, P.O. Box 886, Laredo, Texas 78042-0886.

/s/

EMILIO DAVILA, JR.

February 4th, 1994

To whom it may concern:

I Guadalupe Garza Rodriguez Voluntaryly is writing this affidavit in regard on Enrique Ruiz Mendoza What I'm going to say is on my own free will. I had not been threaten, coerced, or promised anything by anyone. Mr. Enrique Ruiz Mendoza was found guilty in a Court of Law, based primaryly on my testimony. At the time of the Court proceedings I. Testified against Mr. Enrique Ruiz Mendoza Because I. Was pressure by the DEA FORM LAREDO TEXAS Agents. I Knew he was not involved in what I testified. I Guadalupe Garza Rodriguez swear under oath that what I said in here is the truth.

Sincerely

/s/

Guadalupe Garza Rodriguez

/s/

Witness Hector D. Gonzalez 47764-079

/s/

Witness Salvador Ramos 65220-080

APPENDIX D

[Filed August 9, 1994]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

UNITED STATES OF AMERICA *

VS. * CRIMINAL NO. L-92-209

ENRIQUE RUIZ-MENDOZA *

ORDER

This Defendant was convicted on Counts Three and Fourteen of his indictment by a jury verdict rendered on July 9, 1993. On May 4, 1994, he filed a motion for new trial claiming newly discovered evidence. The motion is based on the alleged recanting of trial testimony by Guadalupe Garza Rodriguez, a convicted felon incarcerated at FCI Bastrop. Defendant subsequently filed a motion to depose Garza Rodriguez.

A the trial of this case, Garza Rodriguez gave detailed testimony concerning his involvement as a driver transporting several loads of marihuana from Laredo, Texas to points north. It is undisputed that Garza Rodriguez was caught near Falfurrias, Texas in December 1989, hauling almost 4,000 pounds of marihuana. He testified that the Falfurrias load was one

of four or five similar trips made by him and that at the delivery points, he would meet with Defendant Ruiz-Mendoza, who appeared to be supervising the offloading of the vehicles. To a large extent this testimony was corroborated by witness Jose Armando Alardin. Garza Rodriguez has now signed a terse, conclusory statement that he was pressured to testify against Defendant Ruiz-Mendoza and that, "I knew he was not involved in what I testified." Recanting affidavits and witnesses are viewed with extreme suspicion. United States v. Adi, 759 F.2d 404, 408 (5th Cir. 1985). Moreover, a new trial on the basis of newly discovered evidence should not be granted unless that evidence probably would produce a different result. Id. At 407; United States v. MMR Corp., 954 F.2d 1040, 1046 (5th Cir. 1992). The testimony of Garza Rodriguez had absolutely no bearing on Count Fourteen, the so-called "tar burner" load. Count Three charged Ruiz-Mendoza with being part of an overall conspiracy with Ruben Rodriguez, Jr. And others over an extended period of time. Even were the testimony of Garza Rodriguez to be totally excised from the trial, there would be ample evidence to support the conviction on Count Three. Under these circumstances, no useful purpose would be served by pursuing this matter further. Defendant's motion for new trial and motion to depose Garza Rodriguez are DENIED.

DONE at Laredo, Texas, this 9th day of August, 1994.

/s/
GEORGE P. KAZEN
United States District Judge